No. 17,443

IN THE

United States Court of Appeals

For the Ninth Circuit

FRANK SOUZA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Criminal No. 11,530

BRIEF FOR APPELLEE

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JURISDICTIONAL STATEMENT

Appellee agrees with appellant's statement as to this Court's jurisdiction to hear this appeal, and as to the jurisdiction of the Court below.

STATEMENT OF THE CASE

Appellee agrees with appellant's statement of the case with the exception of appellant's paraphrasing of the testimony of Mr. Suemori (Tr. 108), (App. Br. 11), and the discussion as to the availability of the bolt-cutter to the defendant (App. Br. 13).

Mr. Suemori did not testify that the copper nickel tubing would *most* likely come from "Hawaiian Pine" or other plantations. He testified, rather, that if copper of that sort were to come to him as scrap, it would likely come from the plantations or the Navy. He was not testifying as to the specific origin of the copper nickel tubing in question.

With reference to the bolt-cutter's availability to the defendant, a discussion of the evidence in this regard is found in Part V-B of the argument.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AND THE WRITTEN MOTION FOR A JUDGMENT OF ACQUITTAL OR A NEW TRIAL AS THE LATTER RELATED TO THE SUFFICIENCY OF THE INFORMATION.

A. By not making timely objections, appellant has waived any alleged error in the information.

Objections to any defects the appellant urges are to be found in the information have been clearly waived. Appellant complains that the information is not sufficient after he has waived indictment in the District Court and consented to be charged by information. No motion was made objecting to the information or stating a defense to the charge. When, with appellant's consent, the information was amended for another purpose, the alleged defect was not brought to the Court's attention (Tr. A).

Rule 12 of the Federal Rules of Criminal Procedure states that defenses and objections other than objections that the information fails to show jurisdiction or charge an offense must be raised by motion before trial. No such motion was made by the appellant in the case at bar.

Appellant's opening brief (App. Br. 24-26) cites *United States v. Carll,* 105 U.S. 611 (1881); *Ornelas v. United States,* 236 F.2d 392 (C.A. 9th, 1956); *Lowenburg v. United States,* 156 F.2d 22 (C.A. 10th, 1946); *Meer v. United States,* 235 F.2d 65 (C.A. 10th, 1956); *Sutton v. United States,* 157 F.2d 661 (C.A. 5th, 1946); *United States v. McCulloch* (N.D. Ind. 1947), 6 F.R.D. 559; and *United States v. Tornabene,* 222 F.2d 875 (C.A. 3d 1955), as authority for holding insufficient the charges laid in an indictment or information. All of these cases except the *Sutton* and the *Carll* cases involve an appeal from a district court judge's overruling a timely objection to the formal charge.

Had an objection to the information been made, and if the district judge overruled such an objection and if such ruling had been erroneous, most of the cases cited by the appellant might be in point. Since no such objection was made, appellant relies on the *Sutton* and *Carll* cases only.

The *Sutton* case is not in point as (1) criminal intent was not involved and (2) the defect was an ambiguity as to which of two administrative regulations was violated. Likewise, in the *Carll* case, the omission was an extrinsic fact rather than criminal intent.

The *Sutton* and *Carll* cases will be discussed in Parts I-B and I-D, respectively, *infra.*

Appellant before the trial had ample opportunity to raise objections and defenses. The original information was filed on December 2, 1960 (R. 3) and the amended information was filed on January 1, 1961 (R. 6). All defenses and objections not raised before trial are, therefore, waived. *United States v. Visconti,* 261 F.2d 215 (2 Cir. 1958); *United States v. McDonald,* 293 F. 433 (D.C. Minn. 1923); *Soper v. United States,* 220 F.2d 158 (9 Cir. 1955), cert. denied 350 U.S. 828.

Defects that can be waived include the omission of an allegation of criminal intent. In *United States v. Sherman Auto Corp.,* 162 F.2d 564 (C.A. 2d, 1947), the defendants were charged and convicted under a statute declaring it unlawful for any person to sell commodities in violation of certain price regulations. The Court there found that no crime in fact was committed if the statute was not wilfully violated and that no count in the information contained the word "wilful". The Court, after stating that no objection was timely made, held that the defendants had waived any error. Similarly, in *Finn v. United States,* 256 F.2d 304 (4 Cir. 1958), it was held that where the term "knowingly" and "wilfully" were found in the statute and omitted in the information, any defect thereby is waived if not brought to the Court's attention by a proper motion or objection. Also in *United States v. Sawyers,* 186 F.Supp. 264 (N.D. Cal. 1960), the Court ruled that the defendant waived the fact that the existence of criminal intent was not alleged in the indictment by not properly objecting to it.

A further point indicating the appellant's lack of standing to complain of the formal charge is that this charge is laid in an information rather than an indictment. Rule 7 of the Federal Rules of Criminal Procedure provides in subsection (e):

> "The Court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

This has a further bearing on the appellant's waiver of any alleged defect. The defendant could have had the charge amended if he felt the genuine need of enlightenment. *United States v. Elade Realty Corp.,* 157 F.2d 979 (2 Cir. 1946).

The fact that the formal charge is laid in an information rather than an indictment was also considered in *Finn v. United States, supra.* Although the Court found that it could get to the merits of the case in spite of the fact that the defendant did not make the timely objection, it said:

> ". . . The fact that he delayed raising the objection until it was too late to cure it by a simple amendment, may be a consideration in judging the information's sufficiency." (p. 307.)

Also in *United States v. Sherman Auto Corp., supra,* the appellants contended that the salesmen made innocent mistakes as to the ceiling prices of the cars sold. The Court said that the jury was charged so that the salesmen could only be convicted if they wilfully sold automobiles in excess of the ceiling prices and added that at no time during the trial, or after the

verdict, did the appellants raise any objection to the failure of the information to allege that the charged violations were wilful. The Court further stated that had they done so, the information could have been amended and that under these circumstances, the error, if any, in the formal statement of the charges did not survive the verdict.

B. Regardless of the wording of the information, appellant was not prejudiced.

An indictment or information is required to (1) sufficiently apprise the defendant of what he must be prepared to meet and (2) show with accuracy to what extent he may plead a former acquittal or conviction. *United States v. Debrow,* 346 U.S. 374 (1953). The appellant to complain must allege some prejudice in accordance with these two requirements. *United States v. Davis,* 272 F.2d 149, 150 (7 Cir. 1959).

Regardless of the particular wording of the information in the case at bar, or a consideration as to an alternative manner in which the information could have been worded, appellant below was not prejudiced.

In *Sutton v. United States, supra,* cited by the appellant, the Court found the actual prejudice which the defendant was subject to. In holding the information bad, the Court stated that there were a number of violations in the regulations cited in the information and the record would not sustain a plea of former jeopardy as to any such violations. No such defect appears in the information in the case at bar as the defendant was charged with violating a statute which the defendant himself urges charges but one offense (App.

Br. 26). Appellant does not urge, nor does there exist any situation in which the defendant can be charged again for the same crime charged in the present information.

Was the defendant apprised of what he had to meet upon trial? The record shows that the defendant did not object or present a defense to the information prior to trial. This evidences his satisfaction with it. Further, in defense counsel's opening statement, he said:

> "Mr. Howell. Ladies and gentlemen, I represent the Defendant Frank Souza. The issues in this case are simple, as Mr. Dudley has pointed out.
>
> Mr. Souza denies taking the property in question. He admits selling it to various scrap iron dealers, but he denies that he took it from the U.S. Navy or stole it. *He came in the possession of this property honestly and without any knowledge that this property belonged to the United States Government. We intend to prove that,* and at the end of the case we will ask you for an acquittal on all counts. Thank you." (Emphasis added, Tr. 4.)

The record discloses (Tr. 171-183) that the defendant attempted to explain the manner in which he obtained possession of the copper tubing and in essence claimed that he had received it in good faith not knowing it was stolen or the property of the United States. Although the closing arguments of counsel are not set out in the transcript, there is nothing to indicate that the appellant below did not have an opportunity to argue his defense and to convince the jury of its ef-

ficacy. On proper instructions (Tr. 207, 208) relative to the proof required in regard to criminal intent, the jury found the defendant guilty.

C. Count I of the information supplied a sufficient allegation of criminal intent if such is deemed needed with respect to Counts II, III and IV.

Count I of the information sufficiently alleged criminal intent for the remaining counts. An indictment or information must be considered as a whole. *Carlson v. United States,* 249 F.2d 85, 88 (10 Cir. 1957). In *Dunbar v. United States,* 156 U.S. 185, 192 (1895), the Supreme Court of the United States considered the specific issue urged by the appellant in the case at bar. After considering *United States v. Carll, supra,* the Court stated:

> "A second objection, which is made to all of these counts * * * is that a *scienter* is not alleged. But one good count is sufficient to sustain the judgment. . . ."

In *Hudspeth v. United States,* 183 F.2d 68 (C.A. 6th, 1950), the Sixth Circuit ruled in a similar manner. There, the ground for appeal was that the second count of the indictment failed to allege criminal intent. The Court there held that since the statute (18 U.S.C. 2113) described but a single offense, both counts must be read together. The appellant here urges that the statute in question in the case at bar (18 U.S.C. 641) states but one offense (App. Br. 26); with this the appellee concurs.

Count I of the amended information charges that the defendant "did unlawfully steal" (R. 7). It is

urged that by the authority of the *Hudspeth* case and the *Dunbar* case, Count I of the information in the case at bar suffices for an allegation of criminal intent. See also *United States v. Sawyers, supra.*

D. Counts II, III and IV of the information standing alone are sufficient.

Appellant in his opening brief relies heavily on *Morissette v. United States,* 342 U.S. 246 (1952) and *United States v. Carll, supra.* It is admitted that the *Morissette* case is a correct statement of the law and applicable to the case at bar and that the *Carll* case decided in 1881 has been superseded by the Federal Rules of Criminal Procedure and has been distinguished by later cases so that it is not in point.

1. The Morissette case.

Appellant correctly states the facts in the *Morissette* case. However, the rules as laid down therein does not support appellant's contentions in the case at bar. The *Morissette* case does not concern indictments or information. When considered in the lower court, *Morissette v. United States,* 187 F.2d 427, 429 (C.A. 6th, 1951), the Sixth Circuit touched upon and refused two of the defendant's contentions. The defendant in that case urged (1) that the indictment is required to allege felonious intent and (2) the proof adduced at trial must show felonious intent. As to the first contention, the Sixth Circuit stated:

> "As to the indictment, the federal courts long ago abandoned the course of reversing convictions for crime on technical niceties of pleading. An indict-

> ment is sufficient which fairly apprises the defendant of the charge which he is to meet and enables him to prepare his defense and, after trial, to stand against double jeopardy on a plea of former acquittal or former conviction. This Court has frequently stated the principle."

On appeal, the United States Supreme Court had two specifications of error to consider: (1) with reference to the indictment and (2) with reference to the proof required. The Supreme Court in that case did not overrule the Sixth Circuit's holding with reference to the indictment but rather by a clear implication stated that the rule was correct. The Supreme Court concluded by saying:

> "Of course, the jury, considering Morissette's awareness that these casings were on government property, his failure to seek any permission for their removal and his self-interest as a witness, might have disbelieved his profession of innocent intent and concluded that his assertion of a belief that the casings were abandoned was an afterthought. *Had the jury convicted on proper instructions, it would be the end of the matter.* * * * They might have concluded that the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk . . ." (Emphasis added.) *Morissette v. United States,* 342 U.S. 246, 276 (1952).

Thus, it is seen by reference to appellant's principal authority that the United States Supreme Court would have affirmed the conviction had the jury been properly instructed. In the case at bar, the jury was properly instructed (Part III, *infra*).

In a later Sixth Circuit case, *Logsdon v. United States,* 253 F.2d 12 (6 Cir. 1958), a court had again before it the same issue as passed upon by the Supreme Court in the *Morissette* case. In *Logsdon* the defendant was charged with wilfully misapplying funds of an insured bank. The defendant urged that the indictment, following the words of the statute, did not sufficiently charge a criminal intent to defraud. The Court held that the government, at the trial, would be required to prove felonious intent and stated:

> "Since the ruling involved only the wording of the indictment, it in no way impairs the necessity of proof by the government of criminal intent on the part of the appellant. *Morissette v. United States,* 342 U.S. 246, 264, 274 . . ."

The Tenth Circuit in *Capehart v. United States,* 244 F.2d 74 (10 Cir. 1957), cert. denied 354 U.S. 924, held, in a similar manner, that the failure to allege felonious intent does not make an information defective.

2. The Carll case.

The holding in the *Carll* case as set out in the appellant's opening brief does not apply to the case at bar, and cases decided subsequent thereto indicate that it no longer states the applicable rule of law.

Cannon v. United States, 116 U.S. 55, 79 (1885) (vacated because of lack of jurisdiction, 118 U.S. 355), decided shortly after the *Carll* case, shows that it has limited applicability. There, the Court held:

> "The omitted allegation in that case [*Carll*]—a knowledge of the forgery—was a separate ex-

> trinsic fact, not forming part of the intent to defraud, or of the uttering, or of the fact of forgery; and, in the absence of that allegation, it was held that no crime was charged."

The *Carll* case rule, then, does not apply to criminal intent.

In *United States v. Atkinson,* 34 F. 316 (E.D. Mich. 1888), it was again held that the omission in the *Carll* case was that of a distinct fact which was necessary to be proven and states further that the rule is different where fraudulent intent is to be presumed from the act done.

This Honorable Court in *McKinney v. United States,* 172 F.2d 781, 782 (9 Cir. 1949), has itself considered the *Carll* case. In that case the appellant relied upon *United States v. Carll, supra,* and in affirming the lower court's decision, this Court said:

> "As to United States v. Carll, *supra,* the government urges that such case was decided in 1882 and that the offense under the statute then under consideration was similar to the common law offense of uttering a forged or counterfeit bill while the offenses of possession in the instant case are purely statutory."

The Supreme Court again in 1957 distinguished the *Carll* case in *United States v. Turley,* 352 U.S. 407 (1957). The Court in that case stated that the *Carll* case involved an interpretation of a common law word and offense. Also, a very recent authority, *Harris v. United States,* 288 F.2d 790 (8 Cir. 1961), in passing upon facts similar to those in the *Carll* case, held:

> "The Federal Rules of Criminal Procedure have been adopted since the decision of the Carll case. Such rules were designed 'to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure.' United States v. Debrow, 346 U.S. 374, 376 * * *."

In light of more recent decisions, *United States v. Carll,* 105 U.S. 611 (1881), is not controlling for the case at bar.

3. Good faith defense.

It is not urged that a conclusive presumption of guilt arises when a person is proved to have been in possession of stolen goods. It is urged, however, that good faith is a defense to be asserted by a defendant and negated by the government beyond a reasonable doubt. It need not be alleged in the information. With regard to such a requirement, the United States Supreme Court in 1893 stated in *Evans v. United States,* 153 U.S. 584, 594, 595:

> "Such evidence [of criminal intent] may, however, be manifested by so many acts upon the part of the accused, covering such a long period of time, as to render it difficult, if not wholly impracticable, to aver, with any degree of certainty, all the essential facts from which it may be fairly inferred. . . . 'This means of effecting the criminal intent,' says Mr. Wharton, 'or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to go to the jury to demonstrate the intent, and not necessary to be incorporated in the indictment.'" 1 Wharton's Criminal Law, Section 292.

In *United States v. Allison,* 191 F.Supp. 443 (N.D. Cal. 1960), affirmed in *Beavers v. United States,* 287 F.2d 827 (9 Cir. 1961), it was held that it is not necessary for an indictment to anticipate every possible defense based on authorization and to deny each and every one of these defenses prior to their being raised.

4. Requirement of indictments and informations.

The present rule on the sufficiency of indictments was stated in *Hagner v. United States,* 285 U.S. 427, 431 (1932). With reference to the former practice, it was said:

> "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' "

Again in 1953 in *United States v. Debrow,* 346 U.S. 374, 376, cited by the appellant, the Supreme Court ruled:

> "The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged,

> 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' "

In that case, the trial judge sustained a motion to dismiss and the ruling was upheld by the Court of Appeals. The Supreme Court reversed and held that the indictment was sufficient, stating that the Federal Rules of Criminal Procedure were designed to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure. See also *United States v. Sherman Auto Corp., supra.*

The sufficiency of an indictment should be judged by practical and not by technical considerations. It is nothing but the formal charge upon which the accused is brought to trial and if it fairly informs the accused of the charge which he is required to meet and avoids the danger of being prosecuted again, it is sufficient. *Harris v. United States, supra; Blum v. United States,* 46 F.2d 850 (6 Cir. 1931). The defendant is entitled to a formal and substantial statement of the grounds upon which he is questioned, but not to such strictness in averment as might defeat the ends of justice. *Evans v. United States, supra; Dowling Brothers Distilling Co. v. United States,* 153 F.2d 353 (6 Cir. 1946).

Subsequent to the *Carll* case, numerous courts have passed upon the sufficiency of an indictment where criminal intent, felonious intent, wilfulness, and un-

lawfulness have been alleged not to be sufficiently pleaded. In *United States v. Sawyers, supra,* the defendant was charged with (1) stealing certain logs belonging to the United States, (2) having unlawfully cut certain timber growing on public lands of the United States, and (3) unlawfully removing some of the timber which was so cut. The defendant in that case claimed that the latter two charges should be dismissed because they did not allege the existence of criminal intent. The district judge in the California case, without commenting on the word "unlawful," held that the indictment was sufficient and that it was not necessary for it to negate good faith.

In *United States v. Sherman Auto Corp., supra,* and *United States v. Elade Realty Corp., supra,* the defendants were charged with selling certain property at prices higher than the then ceiling price. In both cases, the defendants urged that the formal charge did not set out criminal intent and that the defendants might be convicted for a good-faith transaction. In both cases, the respective courts held that the indictment was in fact sufficient. See also *Evans v. United States, supra.*

Other cases indicating the liberality employed by Courts of Appeals in reviewing cases where similar error was urged are *Robertson v. United States,* 168 F.2d 294 (5 Cir. 1948), (where against the charge of transportation in interstate commerce of a stolen automobile, it was not error to fail to allege that the vehicle was in fact stolen); *Finn v. United States, supra,* (where the failure to use the words "know-

ingly'' and ''wilfully'' was held not to be error); and *Schmidt v. United States,* 286 F.2d 11 (5 Cir. 1961), (where on a conviction for Federal bank robbery, it was held that an indictment not containing the word ''unlawful'' was sufficient).

The information in the case at bar meets the test for formal charges. It sets out facts in simple language informing the defendant of what he must meet at the trial and is sufficient to bar a subsequent prosecution.

II.

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S WRITTEN MOTION FOR A JUDGMENT OF ACQUITTAL AS IT RELATED TO THE SUFFICIENCY OF THE EVIDENCE.

A. Inconsistency of verdicts.

Defendant in his opening brief (App. Br. 31), states that inconsistency of verdicts is not a ground for reversal. After correctly stating the law in this regard, appellant proceeds to argue contrary to this correct legal doctrine on facts not supported by the evidence. Appellant states that the whole theory of the government is that the defendant both stole, as charged in Count I, and sold, as charged in the remaining counts, the copper tubing in question. Assuming, for the sake of argument, that such is the case, it is immaterial.

In *Dunn v. United States,* 284 U.S. 390, cited by the appellant, the defendant was charged on a three-count indictment, charging *first,* maintaining a com-

mon nuisance by keeping for sale intoxicating liquor; *second,* for unlawful possession of intoxicating liquor; and *third,* for unlawful sale of such liquor. The jury acquitted the defendant on the second and third counts but found him guilty as to the first.

The *Dunn* case raises the same sort of difficulties and would give rise to the same arguments offered by appellant in the case at bar in that *query:* How could the defendant not possess liquor and not sell liquor yet keep a common nuisance based on the prior two facts? Hence, in the case at bar, the appellant cannot rely on a logical inference which is contrary to law and the facts.

The appellant states that the government's theory is that the defendant *alone* executed the theft of the property. There is nothing in the record that supports this statement. The indictment does not state that the defendant *alone* committed the acts charged and nothing in the record so indicates.

B. Sufficiency of evidence.

When reviewing a criminal proceeding which has resulted in a conviction, a court is required to take that view of the evidence most favorable to the government. *Glasser v. United States,* 315 U.S. 60 (1942); *Wright v. United States,* 159 F.2d 8, 9 (8 Cir. 1947); *Schino v. United States,* 209 F.2d 67 (9 Cir. 1953), cert. denied 74 S.Ct. 627. An appellate court in reviewing the sufficiency of the evidence is limited to the consideration of whether there was some competent and substantial evidence. *Banks v. United*

States, 147 F.2d 628, 629 (9 Cir. 1945); *Stillman v. United States,* 177 F.2d 607, 616 (9 Cir. 1949).

The government's case starts with the inference that possession of the stolen property itself raises an inference of guilt. Hence, the defendant's admitted possession and sale of the copper tubing raises an inference which the jury might well have accepted; namely, that the defendant knew of the stolen character of the property and feloniously converted it. In *Morandy v. United States,* 170 F.2d 5 (9 Cir. 1948), cert. denied 336 U.S. 938, the defendant was convicted of transporting a stolen automobile across state lines. The Court acknowledged that the possession of the stolen property in one state raises no presumption that the possessor transported it in interstate commerce, but added:

> "The law is that the possession of the fruits of a crime recently after its commission,—namely, here, the automobile, in the absence of an explanation justifying the possession, warrants an *inference* pointing towards guilt."

This case appears to be in point as the inference is not used to show that the defendant had in fact stolen the automobile but that he transported it in interstate commerce. The same inference was available in the case at bar as the admitted possession of the copper tubing inferred to the jury that the defendant had guilty knowledge of its stolen character when he sold it.

Further evidence was offered in the case at bar by the testimony of Special Agent of the Federal Bureau

of Investigation Sterling Adams (Tr. 155, 156). He testified that upon interview with the defendant on October 11 and 12 of 1960, the defendant denied any knowledge of the stolen copper tubing (Tr. 151, 152). Adams further testified (Tr. 154, 155) that on October 24, 1960, the defendant was again interviewed by him and denied any knowledge of the tubing after being exhibited a sample of it. Then, Adams confronted the defendant with the fact that the FBI had knowledge that he had sold a quantity of tubing. Thereupon, defendant admitted some knowledge of the tubing, but stated that this was the only tubing he had sold.

Adams then confronted the defendant with the fact that the FBI had knowledge that he had sold a second quantity of tubing and, in a like manner, defendant admitted that he had knowledge of the second sale. Evidence of false statements made to the FBI in an attempt to conceal facts can be considered by the jury in coming to its conclusion. *Swartz v. United States,* 207 F.2d 727 (9 Cir. 1953), (discussion in the concurring opinion of Judge Pope).

Testimony was given that the area from which the tubing was stolen was not easily accessible and that security measures were used. Further testimony (Tr. 78) shows that the defendant did, in fact, have access to the area where the tubing was stored. These two facts, considered with all the evidence, are consistent with the jury's finding that the defendant had guilty knowledge when he sold the tubing.

Sterling Adams again testified (Tr. 155) as to the defendant's explanation of where he obtained the cop-

per tubing. His explanation was that he bought it from "some boys" and after further questioning, the defendant changed his story and said he bought it from a "Portuguese man" about whom he couldn't describe age, height or weight or give any kind of description. Defendant's illogical and inconsistent explanation of his possession are again additional facts indicating the guilt of the defendant. There is a logical inference that a person in possession of property knows where it came from and can identify the person from whom he obtained possession. The fact that the property belonged to the United States and was, in fact, stolen raises an inference for the jury that the defendant had guilty knowledge.

The defendant, after he was caught lying, made still another incriminating remark in the presence of Adams. He said, (Tr. 156) "I prefer to say no more about it because I know I am wrong, eh?"

When he took the stand, the defendant gave further testimony, both on direct and cross, which indicated his guilt. He testified as to his method of computing his income tax. He gave the incredible story that he listed his gross sales as his taxable income, stating that he would only list the amount of money received from scrap iron and would not deduct the cost of obtaining the scrap iron. This testimony might indicate that the defendant is truly ignorant but the most logical inference in light of his prior business experience (Tr. 174), is that the defendant, indeed, had no expenses in obtaining the property or that the listing of such expenses would incriminate him.

On further cross examination, the defendant told a story inconsistent with what he had told Special Agent Adams with regard to the person from whom he purchased the property. In response to Mr. Dudley's question (Tr. 175), he testified that he bought the property from someone called "Blackie." This was the third story he had told in this regard, the first being that he purchased it from boys and the second being that he had purchased it from a Portuguese man.

The defendant's possession of stolen property, testimony of his inconsistent and illogical explanation of such and other testimony which indicates a course of conduct consistent and logical with guilt rather than innocence provide substantial evidence upon which a jury found the defendant guilty.

III.

THE DISTRICT COURT DID NOT ERR IN FAILING TO GIVE DEFENDANT'S INSTRUCTION NO. 3.

A. Appellant has both waived objections to the instructions and has specifically acknowledged the fact that the jury was properly instructed.

Any objection the appellant might have to the instructions given to the jury has been clearly waived. Such an assignment of error, even if complained of in appellant's motion for a judgment of acquittal or for a new trial filed on February 7, 1961 (R. 10) would not have and could not have been considered. *United States v. Butch,* 164 F.Supp. 678 (E.D. Pa.

1958). Appellant, in response to the Court's inquiry as to whether there were any exceptions to the charge, replied that there were none (Tr. 220). In failing to object at the time, he may not now assign the omissions as error.

Appellant did not assign this omission as error in his motion for a judgment of acquittal or for a new trial made on February 7, 1961, but rather *specifically acknowledged that the Court properly instructed the jury that knowledge of the ownership and theft of the property sold or conveyed was required in order to convict* (R. 12).

Appellant, now, for the first time in his opening brief, after having conceded that the jury was properly instructed, assigns error to the trial judge's failure to give defendant's requested instruction No. 3. Under Rule 30, Federal Rules of Criminal Procedure, appellant cannot now complain. *Fowler v. United States,* 234 F.2d 695 (5 Cir. 1956).

Nothing in the requested instruction as compared to the instruction given appears to be unique so as to affect a substantial right of the defendant within the purview of Rule 52, Federal Rules of Criminal Procedure.

B. Court's instruction fully covered defendant's requested instruction No. 3 so that there is no error in the charge to the jury.

Appellant refers to the applicable Court's instruction as if it were given in two separate and distinct portions. The instruction reads:

"Now, the elements of the offenses charged in each of Counts 2, 3 and 4 are applicable to each and they are as follows: *First,* that on or about the dates charged the Defendant did sell and convey the property referred to in Counts 2, 3 and 4; *second,* that at the time of the selling the property belonged to the United States or an agency thereof; and, *third,* that when the Defendant sold the property, he had the specific intent to sell the property without lawful authority, *knowing it was property owned by and stolen from the United States;* and, *fourth,* that the property sold was of a value in excess of $100. I have previously told you what the definition of value is, namely, face value, par value, market value, cost, retail or wholesale, whichever one is the greater for the purpose of this statute. Now, if you find that *these four elements,* namely, selling and conveying of property owned by the United States, the selling being by the Defendant with specific intent to sell property without lawful authority, which property he knew was property of the United States or an agency thereof, and that this property was of a value greater than $100, if each and all of those are established beyond a reasonable doubt, then it is your duty to convict as to any count or counts to which you so find. On the other hand, if any one or more of these elements is not so established, then it is equally your duty to acquit the Defendant as to such count or counts as you may so find." (Emphasis added, Tr. 207, 208.)

In instructing the jury, the Court stated: "Now, if you find that these four elements . . . ." (Tr. 208, line 6). Appellant urges that the portion of the in-

struction following this line is defective but ignores, however, the obvious antecedent of the expression "these four elements." The antecedent is clear and the third of these elements is, "knowing it was property owned by and stolen from the United States." There is no other possible interpretation of this instruction.

Appellant cannot complain of a requested instruction not given if the jury was otherwise adequately instructed. This principle applies to the intent necessary to warrant a conviction. *Lee v. United States,* 238 F.2d 341 (9 Cir. 1956).

Appellant cites *Yates v. United States,* 354 U.S. 298 (1957). The facts in the *Yates* case are clearly distinguishable from the facts of the case at bar. Under the Smith Act, the defendant must both organize and advocate to be held criminally liable. The Court held in the *Yates* case that portions of the trial court's instructions were not sufficiently clear or specific to warrant an inference that the jury understood it must find the defendant guilty of both "organizing" and "advocating." In the case at bar, the defendant must not have only sold without authority but must have had knowledge that the property belonged to the United States and was stolen. The jury was clearly instructed in this regard (Tr. 207, 208).

IV.

THE DISTRICT COURT DID NOT ERR IN GIVING A COPY OF THE AMENDED INFORMATION TO THE JURY.

A. By not objecting, appellant has waived any error with regard to the jury's having with it a copy of the amended information.

Appellant acknowledges the fact that no objection was made (App. Br. 20). The effect of such an omission is elementary. In United States courts, defendants are privileged to waive even very substantial rights. *Haskins v. United States,* 163 F.2d 766 (C.A.D.C. 1947). The error assigned here, even if well founded, is by no means substantial. It is sufficient to say that there is no error because nothing was brought to the attention of the trial judge. *Troutman v. United States,* 100 F.2d 628 (10 Cir. 1938).

B. The District Court did not abuse its discretion by allowing the jury to have a copy of the amended information.

A trial judge has discretion as to whether a copy of the indictment or information shall be given to the jury to carry into the jury room, and if properly instructed, this is not error. *C.I.T. Corp. v. United States,* 150 F.2d 85 (9 Cir. 1945); *Shayne v. United States,* 255 F.2d 739, cert. denied 358 U.S. 823. The jury was properly and fully instructed that the information was not to be considered as evidence and its only function was to state specifically the charges that were to be considered against the defendant (Tr. 201).

In order to accept appellant's contentions, we must conclude (1) information was defective, (2) the jury

was not properly instructed as to the requirement of intent and knowledge or that the jury disregarded the Court's instructions as to intent and knowledge, and (3) that the jury disregarded the Court's instructions relevant to the use of the information (Tr. 201). The sufficiency of the information has been discussed in Part I of this argument and the sufficiency of the Court's instruction in Part III.

A court of appeals cannot consider the possibility that the jury acted contrary to the specific and clear instructions of the trial court but rather must assume that the jury acted in accordance therewith based on some evidence to support its findings. *Glasser v. United States, supra.*

V.

THE DISTRICT COURT PROPERLY ADMITTED EXHIBIT 12 INTO EVIDENCE.

A. A proper and complete objection to Exhibit 12 was not made.

Where exhibits are provisionally admitted into evidence, the responsibility is given to the party resisting its introduction to make a motion to strike if he is not satisfied that the evidence has been properly connected to the defendant or the foundation completed and to request the Court to instruct the jury to disregard the exhibit. *United States v. Molzahn,* 135 F.2d 92 (2 Cir. 1943), cert. denied 319 U.S. 774; *Franano v. United States,* 277 F.2d 511 (8 Cir. 1960), cert. denied 364 U.S. 828 (1960). Appellant has not perfected his objection to the admission of Plaintiff's

Exhibit No. 12 into evidence. It was admitted with the understanding that further evidence would be offered relating to it. The District Court had no way of knowing whether the appellant was satisfied with the subsequent evidence and, therefore, no error can be assigned.

Appellant in the trial below had numerous occasions to so move. Immediately after its introduction into evidence, it was withdrawn with the consent of both parties (Tr. 147). Hence, the exhibit was no longer before the jury which, itself, negates the effect it had upon the jury. The defendant at that time did not move to strike nor did he request the judge to admonish the jury to disregard the exhibit. Further, the appellant does not assign as error a refusal to give an appropriate instruction submitted to the trial judge if such an instruction was submitted. Finally, appellant did not object to the instructions as given by the trial judge (Tr. 220).

Any error with respect to Exhibit 12 has been waived on the additional ground that appellant does not here assign error to the introduction into evidence of Exhibit 13.

Both of these exhibits were introduced to show that the defendant had access to a tool (Exhibit 12) which made marks on a length of tubing cut for experimental purposes (Exhibit 13) similar to those on the tubing identified in the information (Exhibit 10). Surely, then, if no error is specified with regard to Plaintiff's Exhibit 13, there can be no error in admitting Plain-

tiff's Exhibit 12, which is just a means by which Plaintiff's Exhibit 13 was admitted.

B. A sufficient foundation was laid for the introduction of Exhibit No. 12.

Jackson Kawewehi testified that Exhibit No. 12 was identical with the bolt-cutter that was issued to Clarence Castro on December 29, 1959, which at that time was unaccounted for (Tr. 142, 143, 144). Castro himself testified that he kept the bolt-cutter on the truck assigned to him for the performance of his duties. Evidence was adduced from various sources showing that Souza worked constantly with Castro (Tr. 85, 87, 89, 90, 135, 152).

Seu Fong Mau testified that Souza at all times worked with either himself or Clarence Castro. In addition, the defendant himself stated to Special Agent of the Federal Bureau of Investigation Sterling Adams (Tr. 152) in response to a question regarding his (Souza's) truck, that on August 10, 1960, he had worked with Clarence Castro.

Admittedly, there appears no affirmative statement which places the defendant in the truck of Clarence Castro at one precise moment. However, it is undisputed that Castro worked continuously with Souza, and since trucks were used in their work, the evidence very clearly indicates that the defendant had worked with Castro while Castro drove his (Castro's) truck. It is clear, then, from the evidence as a whole that the defendant had available to him the tools of Clarence Castro.

It is not necessary in laying a foundation for an exhibit to prove that the defendant had actual possession of the item offered in evidence. Tools used in the perpetration of a crime can be introduced for illustrative purposes. *Sanders v. United States,* 238 F.2d 145 (10 Cir. 1956). In the *Sanders* case, the government offered into evidence a crowbar which was admittedly not connected to the defendant. It was offered solely on the testimony of an expert that such an instrumentality was probably used in the crime and the testimony of another witness that the defendant had attempted to obtain such an instrument.

Similarly, in *White v. United States,* 200 F.2d 509 (5 Cir. 1952), the Court permitted into evidence burglary tools and gloves which were found hidden 1,050 feet from a trailer occupied by the defendant as his residence. In that case, no evidence was offered to show that the tools and gloves actually belonged to the defendant. The Fifth Circuit in reviewing the judge's discretion stated that the jury had a right to infer that the tools were such as could have been used to effect the entry into the building. See also *United States v. Bazzell,* 187 F.2d 878 (7 Cir. 1951); *Morton v. United States, supra;* and *United States v. Lagow,* 66 F.Supp. 738, 740 (D.C.N.Y. 1946), Aff. 159 F.2d 245, cert. denied 331 U.S. 858.

Judge Holtzoff in the *Lagow* case stated that:

> "Evidence to be admissible does not have to be conclusive. All that is necessary is that it have a reasonable tendency to support the ultimate fact."

In that case, the defendant was charged with selling automobiles above the ceiling set by the Emergency Price Control Act. The Court admitted into evidence currency found on the person of the defendant. The money actually paid to the defendant was marked but fifteen minutes after the transfer of the money, the defendant was arrested and had in his possession an equal amount but in different, unmarked currency. It was held that the circumstances of the money being found had some tendency to show the ultimate fact of the sale even though it admittedly was not the actual currency paid.

In the case at bar, the evidence shows that Souza had available to him the bolt-cutter in Castro's possession. The record shows that the jury had submitted to it some of the tubing identified in the information and recovered from the scrap dealers to whom it was sold (Tr. 128) and a sample piece of tubing cut by the bolt-cutter admitted as Exhibit No. 12. The jury, then, could conclude that the same type of bolt-cutter was used to cut the two lengths submitted to them. By the standard of the *Lagow* case, this clearly has probative value. Although there is no eyewitness who saw the defendant with the bolt-cutter in his possession, evidence of its availability to the defendant and its employment in carrying out the crime provide a sufficient foundation for its introduction into evidence. *White v. United States, supra.*

C. The admission of Plaintiff's Exhibit 12, if error, was harmless error.

Appellant does not urge the manner in which the defendant was prejudiced by the introduction of the bolt-cutter into evidence. Certainly, it did not incite the passion of the jury and if not proper, it would be only irrelevant. The jury heard from the various witnesses how closely the defendant was linked to the bolt-cutter. If, indeed, it was irrelevant, then the jury might well have disregarded it rather than have considered it.

The record, without the bolt-cutter, clearly shows the guilt of the defendant (Part II, *supra*). Where the record otherwise satisfies a verdict of guilty, the introduction of needless evidence is not reversible error. *Guy v. United States,* 107 F.2d 288 (C.A.D.C. 1939).

CONCLUSION

This appeal fails to show any grounds sufficient for reversal.

Dated, Honolulu, Hawaii,
January 12, 1962.

Respectfully submitted,

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